LING SING HUNG & ORS

v.

KONTIKI TRADING PTE LTD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: Q-02-656 & 657-96]
28 JULY 1998

CONTRACT: *Interpretation - Construction of terms - Approach to question of construction - Whether contract was one of a guarantee or an indemnity*

CONTRACT: *Variation - Whether there was consent to variation - Section 86 Contracts Act 1950 - Applicability*

The first appellant (in the first appeal) and the second and third appellants (in the second appeal) were at all material times directors of a company ('the company'). The appellants were sued by the respondent on two documents described as letters of indemnity, based on a contract of agency ('the contract') between the respondent and the company. The first appellant argued that the respondent had not proved the losses claimed under the contract while the second and third appellants submitted that they had been discharged of their obligations by virtue of s. 86 of the Contracts Act 1950 as the contract had been varied without their consent.

Held:
Per Gopal Sri Ram JCA

[1] There was sufficient evidence led by the respondent to prove its losses against the first appellant. This included a letter from the first appellant to the respondent acknowledging the sums claimed by the latter against the company.

[2] The contractual incident provided for by s. 86 of the Contracts Act 1950 governs only guarantees as it refers to the tripartite relationship of surety, creditor and principal debtor – expressions which by definition, subsists under a contract of guarantee. Section 86 therefore has no application whatsoever to contract of indemnity.

[3] The true nature and character of a document is not revealed merely by the label that the parties give it. It is for the court to construe the document and determine what it really is.

[3a] In the present case, it was clear from the wording of the documents and surrounding circumstances that they were intended to be something more than mere guarantees. They were in truth indemnities.

[3b] Since s. 86 of the Contracts Act 1950 had no application to indemnities, the variation relied upon by the appellants did not have any effect upon the primary obligation undertaken by them.

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu pertama (dalam rayuan pertama) dan perayu-perayu kedua dan ketiga (dalam rayuan kedua) adalah pada masa yang relevan merupakan pengarah syarikat ('syarikat tersebut'). Perayu-perayu telah didakwa oleh responden berdasarkan dua dokumen yang diterangkan sebagai surat tanggung rugi, berdasarkan suatu kontrak agensi ('kontrak tersebut') di antara responden dan syarikat. Perayu pertama telah berhujah bahawa responden telah tidak membuktikan kerugian yang dituntut di bawah kontrak tersebut sementara perayu-perayu kedua dan ketiga telah berhujah bahawa kontrak tersebut telah diubah tanpa persetujuan mereka dan oleh kerana itu, berdasarkan s. 86 Akta Kontrak 1950, mereka dilepaskan dari tanggungjawab mereka.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Terdapat keterangan secukupnya yang dikemukakan oleh responden untuk membuktikan kerugiannya terhadap perayu pertama. Ini termasuk suatu surat dari perayu pertama kepada responden yang mengesahkan tuntutan yang dibuat oleh responden terhadap syarikat.

[2] Keadaan kontrak yang diperuntukkan oleh s. 86 Akta Kontrak 1950 hanya merangkumi gerenti kerana ianya merujuk kepada perhubungan tiga pihak iaitu penjamin, pemiutang dan penghutang utama – terma-terma yang menurut definasinya hanya wujud di bawah kontrak gerenti. Maka s. 86 tidak ada pemakaiannya kepada kontrak tanggung rugi.

[3] Sifat dan watak sebenarnya dokumen tersebut adalah tidak diperlihatkan hanya dengan label yang diberikan oleh pihak-pihak. Adalah untuk mahkamah supaya mentafsirkan dokumen dan untuk menentukan apa dia sebenarnya.

[3a] Dalam kes ini, adalah jelas dari perkataan-perkataan dalam dokumen dan keadaan sekelilingnya bahawa ianya diniatkan sebagai lebih dari suatu gerenti sahaja. Sebenarnya ianya adalah suatu tanggung rugi.

[3b] Oleh kerana s. 86 Akta Kontrak 1950 tidak ada pemakaiannya kepada tanggung rugi, maka pengubahan yang dihujahkan oleh perayu tidak mempunyai sebarang kesan ke atas tanggung jawab utama yang dipikul.

[Rayuan ditolak.]

Cases referred to:
Ashmore v. Corp of Lloyd's [1992] 2 All ER 486 ***(refd)***
Lakeman v. Mountstephen [1874] LR 7 HL 17 ***(foll)***
South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801 ***(cit)***

Legislation referred to:
Contracts Act 1950, ss. 77, 79, 86, Part VIII

For the 1st appellant - KK Hii; M/s Hii & Hii
For the 2nd & 3rd appellants - YY Sim; M/s Tang & Partners
For the respondent - Wong Ho Leng; M/s Wong Ho Leng & Co

[Appeal from High Court, Sibu; Suit No: 16 of 1990]

Reported by Mariette Peters-Goh

JUDGMENT

Gopal Sri Ram JCA:

There are two appeals. The first, civil appeal no. 656/96, is brought by Ling Sing Hung. He was the second defendant in the court below. He is now a bankrupt. He brought his appeal with the consent of the official assignee. We will refer to him as "the first appellant."

The second appeal, civil appeal no. 657/96, is brought by Pau Ngie Siong and Hii Yii Pan. They were the third and fourth defendants in the court below. We will refer to them in this judgment as "the second and third appellants."

All three appellants were, at all material times, directors of a company called Protama Sdn Bhd ("the company"). The first appellant was also the company's managing director. The company was named as the first defendant in the writ. It has not appealed.

The appellants were sued by the respondent (the plaintiff in the court below) on two documents that were described as letters of indemnity. The substance of the respondent's case appears in paras 4-11 of its statement of claim which read as follows:

4. By a Contract of Agency dated August 4, 1988, the 1st Defendant requested the Plaintiff and the Plaintiff agreed to act as the 1st Defendant's agent to enter into a series of contracts for the sale of the 1st Defendant's cargoes with its end buyer. The Plaintiff shall refer to the Contract of Agency for its full terms and effect at the trial.

5. In consideration of the Plaintiff entering into the said Contract of Agency with the first Defendant, the 2nd Defendant on August 4, 1988 and the 3rd Defendant on September 6, 1988 by a Letter of Indemnity ("the First Indemnity") agreed, and irrevocably and unconditionally undertook *inter alia*:

(i) at all times indemnify the plaintiff and hold the plaintiff harmless, fully and completely, from and against any claims, counterclaims, demands, actions, proceedings, damages, costs, expenses, losses and all other liabilities whatsoever including legal costs (on the basis between solicitors and own clients) which the plaintiff may suffer, incur or sustain by reason of, arising from or in connection with the letter of credit transactions; and

(ii) to pay to the plaintiff immediately on demand and money payable by the 2nd and 3rd Defendants under the First Indemnity.

6. By a letter of Indemnify made at various times in April, 1989 ("the Second Indemnity"), the 2nd, 3rd, 4th and 5th Defendants had, in consideration of the Plaintiff entering into the Contract of Sale and Purchase with the 1st Defendant jointly and severally and irrevocably and unconditionally guaranteed the due performance by the 1st Defendant of all the terms of the Contract and undertook to, *inter alia*

(i) at all times indemnity the Plaintiff and hold that Plaintiff harmless, fully and completely, from and against any claims counterclaims, demands, actions, proceedings, damages, costs, expenses, losses and all other liabilities whatsoever including legal costs (on the basis between solicitors and own clients) which the Plaintiff may suffer, incur or sustain by reason of, arising from or in connection with the letter of credit transactions, and

(ii) to pay to the plaintiff immediately on demand any money payable by the 2nd, 3rd, 4th and 5th Defendants under the Second Indemnity.

7. The Plaintiff shall refer to the said First and Second Indemnities for their full terms and effects at the trial.

8. The 1st Defendant, on July 7, 1989, acknowledged in writing that it owed the plaintiff a total of S$145,952.12 and US $326,724.66 in respect of the letter of credit transactions referred to in the first and second indemnities, details of which are described therein ("the Acknowledgement of Debts"). The Plaintiff shall refer to the Acknowledgement of Debts for its full terms and effect at the trial.

9. By letter dated August 2, 1989, the Plaintiff's solicitors Messrs Mutang & Lee demanded on the Plaintiff's behalf from the 1st Defendant the payment of S$145,952.12 and US $326,724.66 but the 1st Defendant has failed and still fails to pay the said sum to the Plaintiff or its Solicitors.

10. By letter dated August 2, 1989, the Plaintiff's Solicitors demanded on the Plaintiff's behalf that the 2nd and 3rd Defendants indemnify the Plaintiff pursuant to the terms of the First Indemnity by payment of the sum of S$145,952.12 to the Plaintiff but both the 2nd and 3rd Defendants have failed and still fail to indemnify the Plaintiff.

11. By letter dated August 2, 1989, the Plaintiff's Solicitors demanded on the Plaintiff's behalf that the 2nd, 3rd, 4th and 5th Defendants indemnify the Plaintiff pursuant to the terms of the Second Indemnity by payment of the sum of US$326,724.66 to the Plaintiff but the 2nd, 3rd, 4th and 5th Defendants have failed and still fail to indemnify the Plaintiff,"

To these points the second and third appellants raised several alternative defences, including a rolled-up plea of misrepresentation and undue influence. All pleaded defences were pursued at the trial. Having regard to the quality of the evidence placed before him, it comes as no surprise that the learned trial judge rejected all the defences put forward by these appellants. With respect, it would appear that those having conduct of the case of the second and third appellants did not have in mind the following observation of Lord Templeman in *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486, 493:

> It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.

The case of the first appellant is quite hopeless. The main argument raised by his counsel in support of his appeal was that the respondent had not proved the loses claimed by it under the letters of indemnity pleaded in the statement of claim and that the learned judge ought to have so held. With respect to Mr KK Hii who argued the first appellant's appeal with much skill, we found no merit in his complaint. There was sufficient evidence led by the respondent to prove its losses. It included a letter from the first appellant to the respondent acknowledging the sums claimed by the latter against the company. The first appellant's feeble attempt to explain away this document as the product of a false representation made by the respondent was rightly rejected by the learned trial judge. After carefully considering all the arguments advanced on the first appellant's behalf we found ourselves unable to differ from the views expressed by the learned judge. We therefore dismissed the first appellant's appeal with costs.

With that we now turn to the appeal of the second and third appellants. The only point pursued before us by their counsel was that the contract between the respondent and the company had been varied without his clients' consent in consequence of which the second and third appellants were discharged from their obligation under the letters of indemnity. This argument is based on s. 86 of the Contracts Act 1950 ("the Act") which provides as follows:

> Any variance, made without the surety's consent, in the terms of contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

We are of the view that when considering s. 86, regard must be had to the defining provisions under Part VIII of the Act. These are ss. 77 and 79. Section 77 defines a contract of indemnity as "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person." Section 79 of the Act says that a contract of guarantee "is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'."

In our judgment, the contractual incident provided for by s. 86 governs only guarantees because it refers to the tripartite relationship of surety, creditor and principal debtor; expressions which, by definition, subsist under a contract of guarantee. Section 86 therefore has no application whatsoever to contracts of indemnity. See, *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 2 MLJ 355.

In the present instance it was not contended either at the trial or before us that the documents upon which the second and third appellants were sued were not true indemnities but were, upon their proper construction, really guarantees. We are of the view that in any event an argument to that effect would have failed because the two documents set out in the statement of claim are, upon their true construction, indemnities and not guarantees.

We accept as settled law that the true nature and character of a document is not revealed merely by the label that parties give it. It is for the court to construe the document and determine what it really is. In the present case it is clear from the wording of the documents and the surrounding circumstances that they were intended to be something more than mere guarantees. This tells in favour of they being in truth indemnities. They are more consistent with a primary obligation on the second and third appellants to secure the respondent against loss if the transaction should turn out unremunerative, rather than a

secondary obligation to make good the particular defaults of the company. There was here neither surety, creditor nor principal debtor. And, as Lord Selborne observed in the leading case *Lakeman v. Mountstephen* [1874] LR 7 HL 17, 24:

> There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto,* and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

Since the letters of indemnity upon which the second and third appellants were sued are not guarantees, s. 86 of the Act has no application. The variation relied upon by these appellants does not therefore have any effect upon the primary obligation undertaken by them. The trial judge was therefore entirely correct in holding the second and third appellants liable on the two letters of indemnity.

There is an added reason why the learned trial judge's finding in the respondent's favour should be upheld. It was contended by the second and third appellants that they were "sleeping directors" and that they had not given their consent to the variation. However, there was evidence from the first appellant which went the other way. That evidence appears to have been accepted by the judge. The judge also rejected the evidence of the second and third appellants on the point. He gave cogent reasons for doing so.

Having seen and heard the witnesses, an advantage which this court plainly lacks, his assessment of where the truth lay is entitled to have great weight. And in a matter such as the present, where much depends upon the impression created by witnesses upon the mind of the judge who saw and heard them, we must be most reluctant to interfere with his findings of primary facts.

For these reasons we came to the conclusion that these two appeals should be dismissed with costs. We so ordered. The learned judge's decision was affirmed. We also ordered that the costs of the appeals should be taxed on separate bills. The deposits lodged in court were directed to be paid out to the respondent to account of its taxed costs.